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Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices (File No. S7-17-22)

Dear Ms. Countryman:

We are responding to the request of the Securities and Exchange Commission (the “Commission”) for comments to the proposed rules relating to enhanced environmental, social and governance (“ESG”) disclosures by investment advisers and investment companies (the “Proposed Rules”).¹ We recognize the time and effort invested by the Commission and the Staff of the Division of Investment Management (the “Staff”) in formulating the Proposed Rules and appreciate the opportunity to comment.

Schulte Roth & Zabel LLP is an international law firm with offices in New York, London and Washington, D.C. Our clients include many registered investment advisers (“RIAs”) that will be affected by the Proposed Rules as well as institutional investors and limited partners. We regularly advise investment adviser clients with respect to regulatory obligations and responsibilities, including ESG related matters. These comments, while informed by our experience in representing our clients, represent our own views and are not intended to reflect the views of any of the clients of the firm.

I. Introduction

The Proposed Rules seek to: (1) increase the availability of information about ESG-driven funds and strategies and (2) reduce the risk that investors are misled about the extent to which RIAs incorporate ESG factors into their investment practices.

While we agree that investors should have accurate information to evaluate ESG-related products and strategies, we are concerned that the proposed disclosure requirements are so broad and imprecise that they risk causing confusion about ESG rather than promoting transparency, thereby exacerbating the very issues the Proposed Rules seek to address. The Proposed Rules define the

¹ *Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social and Governance Investment Practices*; Release No. IA-6034 (May 25, 2022) (the “Proposing Release”).

categories of ESG strategies so broadly that almost every strategy will be an “ESG Integration” strategy covered by the rules. In addition, the Proposed Rules do not distinguish between strategies that incorporate non-financial ESG goals and those that do not, or between strategies that are marketed as ESG and those that are not.

In light of these concerns, we respectfully suggest that the Commission:

- consider eliminating “ESG Integration” as a category; and
- consider focusing any additional ESG disclosure requirements on those strategies that either (1) have non-financial ESG goals or (2) are marketed as ESG strategies.

II. Consider Eliminating “ESG Integration” as a Category

We believe there is a disconnect between the “ESG” strategies² the Proposed Rules seek to target and the broad definition of “ESG Integration” that includes any product or strategy that “considers” one or more environmental, social or governance factors.³

The Proposed Rules require RIAs to make detailed disclosures in Part 2A of Form ADV for any “ESG Integration” strategy or fund that considers one or more ESG factors along with other, non-ESG factors in its investment decisions where those ESG factors are generally no more significant than other factors in the investment selection process.⁴ This ESG Integration category will encompass the vast majority of investment advisers because governance, environmental and/or social factors are at least considered in most strategies. Fundamental securities research typically requires consideration of the governance of the issuer: the rights and obligations of directors, officers, shareholders and others, as well as the merits of the individuals and teams in current management. Environmental factors are relevant to the value of the vast majority of companies. Consideration of such factors as part of fundamental research does not mean the adviser is pursuing an “ESG”, “socially responsible” or “sustainable” strategy. Yet, the Proposed Rules would label every strategy as an “ESG” strategy simply because such factors are considered. We do not believe that investors would expect this to be the case and, in fact, we would expect investors to be confused by labeling every fundamental research strategy as an ESG strategy. If effectively every strategy is labeled “ESG”, the term “ESG” loses its meaning.

RIAs are already required to disclose to clients and investors the material features of their relevant investment strategies. The Proposed Rules would add onto that significant new disclosures by the vast majority of RIAs with respect to strategies that the RIAs, clients and investors would not understand to be “ESG” strategies. The Commission acknowledges that it “has not generally prescribed specific disclosures for particular investment strategies” but indicates that such disclosures are required for ESG to (1) reduce the risk of greenwashing (i.e., where advisers overstate the significance of ESG to their particular strategies and thus mislead investors) and (2)

² The Commission states that it uses the term “ESG” to encompass terms such as ‘socially responsible investing,’ ‘sustainable,’ ‘green,’ ‘ethical,’ ‘impact,’ or ‘good governance’ to the extent they describe environmental, social, and/or governance factors that may be considered when making an investment decision.” *Id.* at footnote 6.

³ *Id.* at 14.

⁴ *Id.* at 26.

allow investors to understand and compare ESG approaches.⁵ However, by sweeping almost all RIAs into the “ESG Integration” category and requiring detailed disclosures, we are concerned the Proposed Rules will create confusion and a greater risk of greenwashing as a result.⁶ If almost all strategies are categorized as “ESG,” investors very well may have a difficult time understanding what it means to be an ESG strategy.

III. Consider Focusing Any New ESG Disclosure Requirements on Strategies that Have Non-Financial ESG Goals or Are Marketed as ESG Strategies

Rather than having overly broad and imprecise disclosure requirements that will create market confusion about ESG, we instead suggest the Commission focus any new ESG disclosure requirements on ESG strategies that present a higher risk of investors being confused or misled.

A. Non-Financial Goals

Certain advisers, clients and investors seek to promote values or practices unrelated to potential pecuniary risk or reward. For example, some are based on ethics, morals, religious beliefs or views of social responsibility. The Commission acknowledges in the Proposing Release that some investment strategies or products “have objectives that extend beyond risk/return goals.”⁷ The Proposing Release suggests that in these circumstances additional disclosure may be appropriate about “the investment selection and engagement process to ensure that the process aligns with the ESG-related values or priorities of the investor, rather than simply as a means for gauging effectiveness of the end result of financial return.”⁸ Beyond this suggestion, however, the Proposing Release does not indicate how non-financial goals should be addressed. To the extent that non-financial goals are incorporated into an investment strategy, investors may benefit from disclosures with respect to such goals and the means by which they are incorporated into the investment strategy.

B. Strategies Marketed as ESG

The predominant justification for the Proposed Rules is to promote accurate communications with clients and investors. There is already a requirement that material facts related to investment strategies are disclosed to investors. Any additional disclosure requirements might be focused on situations where an RIA is affirmatively marketing a strategy as “ESG” (as that term is used by the Commission in the Proposing Release).⁹ In such instances, the required specificity and amount of disclosure could be tied to the extent to which the RIA markets the strategy as ESG. In other

⁵ *Id.* at 17. “Funds and advisers with ESG-related investing objectives can consider factors and measures in addition to those often used to measure financial return to manage the portfolio. They may also use additional key performance indicators specific to ESG objectives to assess the fund’s or adviser’s effectiveness in meeting these goals.” *Id.* at 19-20.

⁶ For private funds, the proposed disclosures would also be redundant of the disclosures in the specific offering documents that are tailored to the specific investments. Because all fund investors receive such disclosures, there is no need for them to be incorporated into the Form ADV where their public dissemination risks revealing strategic proprietary information that otherwise is only shared with fund investors but not the public.

⁷ Proposing Release at 19.

⁸ *Id.* at 20.

⁹ See footnote 2, above.

words, more detailed disclosures as to the ESG strategy might be appropriate where there is greater emphasis on ESG strategies in the marketing.

To implement this approach, Item 8.D of Form ADV Part 2A could be revised to state: “Provide a short description of any ESG program or strategy you market to clients or investors.” Thus, for example, an RIA investing in real estate that reviews environmental studies as part of its research process would only need to make ESG disclosures with respect to its investment strategy if it markets that strategy as “ESG.”¹⁰

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We would be pleased to respond to any inquiries you may have regarding our letter or our views on the Proposed Rules more generally. Please feel free to direct any inquiries to Marc Elovitz, Kelly Koscuizka or Tinika Brown at (212) 756-2000.

Respectfully submitted,

SCHULTE ROTH & ZABEL LLP

cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark T. Uyeda, Commissioner
The Honorable Jaime Lizarraga, Commissioner

¹⁰ This approach would also avoid forced advertisement of ESG services. Certain advisers provide ESG services only to accommodate mandates or investment restrictions of certain clients or investors but do not seek to provide or market “ESG” strategies. Currently, the disclosures required by the Proposed Rules would effectively advertise services to the broader market that advisers may not wish to make available to all investors.